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No. 96-375

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ABDULLAH E. AL-HARBI,
Petitioner,

v.

CITIBANK, N.A. and CITIBANK, A.S.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

When a party requests a specific arbitrator but fails to request an investigation of the business dealings of that arbitrator's former employer, does the Federal Arbitration Act imply, *sub silentio*, an independent duty on the arbitrator's part to investigate a business relationship of its former employer (1) that is unrelated to the dispute being arbitrated, (2) in which the arbitrator himself was not involved, and (3) that was unknown to the arbitrator and therefore could not affect his decision?

RESPONDENTS' CORPORATE DISCLOSURE PURSUANT TO S. CT. R. 29.6

The statement of Respondents' corporate affiliations given on page ii of the Petition is correct.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

The Petition mischaracterizes both the decision of the court of appeals below and the decision in *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994), in an attempt to manufacture an intercircuit conflict where none exists. This case presents no substantial unsettled question of federal law. Accordingly, the Petition lacks merit and should be denied.

PROCEEDINGS BELOW

On July 18, 1995, the U.S. District Court for the District of Columbia, in an unpublished order, denied Petitioner's motion to vacate the arbitration award.

On June 11, 1996, the U.S. Court of Appeals for the District of Columbia Circuit issued its opinion affirming the district court. *Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 683 (D.C. Cir. 1996). The court of appeals held that, where the applicable arbitration rules did not require investigation of the business contacts of the arbitrator's former employer, the failure to conduct such an investigation, standing alone, was insufficient proof of "evident partiality" to justify vacating the award. The court of appeals distinguished, as legally and factually inapposite,

authorities offered by Petitioner holding that where specific arbitration rules require such an investigation, the failure to investigate can lead to vacatur. The court of appeals also rejected Petitioner's argument that the arbitrator exhibited "manifest disregard" of the applicable law. This latter holding is not challenged in the Petition.

STATEMENT OF THE CASE

Petitioner Abdullah E. Al-Harbi invested in a real estate development project in the Czech Republic in 1992. Partial financing for the development was provided by Respondent Citibank, a.s., a Czech corporation.

A dispute later arose over the transaction. When Mr. Al-Harbi was unable to resolve his dispute with Citibank, a.s., the parties agreed to submit the matter to nonbinding mediation. The parties jointly selected Kenneth R. Feinberg, an attorney and financial expert, as the mediator. In a pre-mediation interview with counsel for Mr. Al-Harbi, Mr. Feinberg disclosed, among other things, that he had once been a partner in the large New York law firm of Kaye, Scholer, Fierman, Hays & Handler ("Kaye, Scholer"). The nonbinding mediation was held in London in early October 1994.[1]

At the mediation, it shortly became clear that the parties' positions could not be reconciled and mediation would not resolve the dispute. Accordingly, both sides agreed to submit the dispute to binding arbitration. Mediator Feinberg suggested several former federal judges who could serve as arbitrators and suggested that the arbitration occur in ninety days. Mr. Al-Harbi insisted, however, upon an immediate, binding decision. He therefore rejected Mediator Feinberg's list of suggested arbi-

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[1] Thus, this case involves a London mediation, and subsequent arbitration, of a dispute between a Saudi citizen and a Czech corporation over a transaction that occurred in the Czech Republic involving a parcel of Czech real estate. Although issues of personal jurisdiction and *forum non conveniens* are not mentioned in the Petition, they were substantial factors in the prior proceedings in this case, and form additional reasons for this Court to deny certiorari.

trators and insisted that Mediator Feinberg himself serve as the arbitrator. This much must be clear: Mr. Feinberg served as the arbitrator in the binding arbitration because Mr. Al-Harbi demanded that he do so. Mr. Al-Harbi did not, at this or any other time, request any investigation into the prior business dealings of Mr. Feinberg's former employer. On October 7, 1994, the parties signed a binding arbitration agreement requiring Mr. Feinberg to issue his final decision within six days.[2]

The arbitrator issued his final decision on October 13, 1994, ordering Respondents to pay Mr. Al-Harbi $1.1 million "in full satisfaction and resolution of all issues arising from this dispute." (Arbitrator's Decision at 10–11). Unsatisfied with this substantial sum, Mr. Al-Harbi brought suit to have the order set aside under the Federal Arbitration Act (FAA), 9 U.S.C. § 10. The sole basis for this lawsuit relevant to the instant Petition was Mr. Al-Harbi's allegation that the arbitrator's *former* law firm, New York's Kaye, Scholer, had once represented Citibank on intermittent banking matters wholly unrelated to the instant proceeding.

It has at all times been undisputed that: (1) Mr. Feinberg was not aware of the relationship between his former employer and Citibank; (2) Mr. Feinberg never worked on any matters for Citibank during his tenure at Kaye, Scholer; (3) Kaye, Scholer never performed any services for Citibank relating to this dispute or the underlying real estate transaction; (4) Mr. Feinberg held no continuing financial interest in Kaye, Scholer at the time of the arbitration except for any receivables that were owed the firm at the time of his departure; and (5) Mr. Feinberg had no financial interest of any kind in the outcome of the arbitration.

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2 The parties' Agreement also provided that "All parties agree that they will be without recourse to challenge the binding decision of the Mediator, and the decision will be binding on the parties, and all heirs, successors or assigns, in any and every court or tribunal in any and every country in the world, whether known or unknown as of the date hereof." (Agreement at 1, para. 2).

REASONS FOR DENYING THE WRIT

There is No Circuit Split or Important Unsettled Question of Federal Law Requiring Action by This Court

The decision of the court of appeals affirming the district court is correct and does not conflict with any decision of this Court or any decision of any other court of appeals. Further review by this Court is not warranted.

The Petition attempts to manufacture a circuit split, ostensibly between *Schmitz v. Zilveti*, 20 F.3d 1043 (9th Cir. 1994) on one side, and *People's Security Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141 (4th Cir. 1993), and the court of appeals's decision in this case on the other. But contrary to Petitioner's argument, there is no split among the circuits on any substantial question of federal law requiring resolution by this Court.

In this case, the D.C. Circuit took pains to distinguish *Schmitz* from the case before it. Petitioner cannot seriously contend that a "split of authority among the federal circuits" (Pet. 5) results every time one appeals court concludes that another's precedent is not on point. The D.C. Circuit in this case simply ruled that the *Schmitz* case did not resolve the question this case presented; it did not hold that *Schmitz* governed but was wrongly decided. *See Al-Harbi v. Citibank, N.A.*, 85 F.3d 680, 682–83 (D.C. Cir. 1996) (finding *Schmitz* "distinguishable both on its facts and the applicable law. . . . Thus, even if *Schmitz* were our own decision, it *would not answer the question before us today.*") (emphasis added) (Pet. App. 5a).

Moreover, the distinctions the court of appeals recognized between *Schmitz* and this case support its conclusion that the Ninth Circuit's precedent does not govern here. The key fact Petitioner overlooks is that, in *Schmitz*, the arbitration was conducted under the rules of the National Association of Securities Dealers ("NASD"), which expressly and specifically required the arbitrator to investigate the known potential conflict in that case. The Ninth Circuit merely held that this express requirement

meant what it said.[3] *Schmitz* did not hold that an arbitrator would have had such a duty to investigate in the absence of a rule requiring it. Accordingly, *Schmitz* provides no support for Petitioner's argument that the FAA, without saying so, requires an arbitrator to undertake the same investigation expressly mandated by the NASD Rules. *Schmitz* turned on facts that are indisputably absent in this case: no arbitration rules required investigation of the alleged conflict Petitioner now says tainted the arbitration.[4]

Additional distinctions between *Schmitz* and this case render *Schmitz* inapplicable. The arbitrator in *Schmitz* was aware of the business relationship he failed to disclose, whereas it is undisputed in this case that Mr. Feinberg had no knowledge of his former employer's representation of Citibank. *See Betz v. Pankow*, 38 Cal. Rptr. 2d 107, 111–12 (Cal. Ct. App. 1995) (*Schmitz* notwithstanding, attorney arbitrator "cannot be faulted for failing to disclose facts of which he was unaware," specifically, his former law firm's work on behalf of one party to the arbitration), *review denied* (Cal. S. Ct. Apr. 19, 1995). It is also undisputed that Mr. Al-Hakbi himself had actual knowledge of the arbitrator's former employment with Kaye, Scholer. *See id.* at 112 (arbitrator's "prior membership in the Bronson firm was disclosed"); *see also Woods v. Saturn Distrib. Corp.*, 78 F.3d 424, 428 (9th Cir.) (arbitrator's challenged business relationship

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3 *Accord Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157 (8th Cir. 1995) (vacating award because arbitrator failed to comply with governing NASD disclosure rule).

4 Similarly, in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. —, 115 S. Ct. 1212 (1995), this Court recognized that the NASD Rules provided for an arbitral award of punitive damages, thereby justifying the award in that case. The extended discussion in *Mastrobuono* would have been mere dicta if the arbitral panel could simply have awarded punitive damages irrespective of the NASD Rules. What the Petition fails to recognize is that the rules under which an arbitration is conducted *matter*, and court holdings relying on one set of rules (*Schmitz*) cannot simply be transposed to an environment where those rules do not govern (this case).

was known to all parties when they agreed to arbitrate), *cert. dismissed*, 65 U.S.L.W. 3181 (Sept. 17, 1996).

Thus, the court of appeals in this case correctly determined that *Schmitz* did not supply a governing rule in this case. Its distinction of *Schmitz* did not create a split among the circuits.

Judicial prudence also counsels against granting certiorari in this case. Initially, it is evident that no important dispute of federal law exists here. Apart from the Ninth Circuit in *Schmitz* and the court of appeals in this case, only one appellate court has ever touched on the question Petitioner now seeks to place before this Court. That case, *People's Security Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141 (4th Cir. 1993), actually weighs substantially against Petitioner's argument. *People's Security* is distinguishable from *Schmitz* on precisely the same basis as this case: the arbitration in *People's Security* was not conducted pursuant to the NASD Rules or any other provisions requiring investigation of the prior business relationships of the arbitrator's former employer. For present purposes, however, the point is simply that this case presents no widespread schism among the courts of appeals on a pressing controversy that warrants this Court's involvement.

It is also obvious that the Petitioner, or any other party in his position, could easily have protected himself simply by contracting for the investigation he now wishes to write into the FAA. Mr. Feinberg's duties as an arbitrator were found within the four corners of the parties' agreement to submit the case to binding arbitration.[5] Those express duties did not include an obligation to investigate the business dealings of the arbitrator's former employer. Mr. Al-Harbi, however, certainly could have included such a requirement in the agreement had he wished. Indeed, had he done so, the *Schmitz* case might well have been

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5 *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. —, 115 S. Ct. 1920, 1924 (1995) ("arbitration is simply a matter of contract between the parties"); *Mastrobuono*, 115 S. Ct. at 1215–19; *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 679 (7th Cir.) (emphasizing contractual sources of arbitrators' powers and duties) (Posner, J.), *cert. denied*, 464 U.S. 1009 (1983).

on point, for the arbitrator would then have had an express duty to investigate similar to the express duty that case held dispositive. Here, however, Petitioner is simply asking this Court to protect him from a problem he or others in his position could readily have prevented in the first instance. His failure to do so suggests that the issue presented in the Petition amounts to nothing more than an expression of dissatisfaction with the arbitrator's decision.[6]

Because this case involves no disagreement among the circuits on any substantial question of federal law, this Court should deny the Petition for Writ of Certiorari.

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6 Judge Posner's skeptical view of the losing party's true motivation for complaining about the arbitrator's impartiality in *Merit* seems equally true here:

> [T]his is a $10 million case. If Leatherby had been worried about putting its fate into the hands of someone who might be linked in the distant past to the adversary's principal, it would have done more than it did to find out about Clifford. That it did so little suggests that its fear of a prejudiced panel is a tactical response to having lost the arbitration.

Merit, 714 F.2d at 683.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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